

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF HAWAII**

In re

HIRAM FONG, JR.,

Debtor.

Case No. 01-00242  
Chapter 7

Re: Docket No. 288, 308

**MEMORANDUM DECISION REGARDING  
BANKRUPTCY COURT JURISDICTION  
OVER ABANDONED ASSETS**

The question presented is whether the bankruptcy court has jurisdiction to enter an order transferring a disputed tax lien and a judgment lien from property, some of which has been abandoned and some of which has not, to the proceeds of sale of the abandoned property. The judgment lien creditor argues that the court has such jurisdiction, but the tax creditor disagrees. I hold that the bankruptcy court has jurisdiction to grant the requested relief.

When the order for relief was entered on February 27, 2001, the debtor owned a limited partnership interest in Kalani Gardens Limited Partnership and certain stock in Market City, Ltd. The partnership interest and the stock were subject to a tax lien in favor of the State of Hawaii ("State") in the amount of \$198,812.38 (as of July 6, 2005) and a judgment lien in favor of Joel, Daniel, and

Isaac Pahk (“Pahks”) in an amount in excess of \$1,627,422.65. By orders entered on January 8, 2004, and February 28, 2005, the court permitted the trustee to abandon the partnership interest and the stock pursuant to 11 U.S.C. § 554. Both liens may also encumber other property which remains in the estate.

The debtor and the Pahks wish to sell the abandoned assets to one or more trusts controlled by the debtor’s mother for a price of about one million dollars. The purchaser is unwilling to purchase the assets unless they are free of the tax and judgment liens. The Pahks believe that the State’s claims are overstated and partly time-barred. Therefore, the Pahks are not willing to see the State’s claims paid in full at closing. They are willing, however, to have enough of the proceeds to cover the State’s claims deposited in an escrow pending a determination of the State’s claims. The State is willing to release its lien on the assets at the closing of the sale but only if all of the sale proceeds are held in escrow. The Pahks find this unacceptable.

On June 17, 2005, the Pahks filed an objection to the State’s secured claim, contending that the claim is unsupported and that the statute of limitations bars portions of it. An evidentiary hearing on the objection was set for December 5, 2005, but has been continued to March 6, 2006, by agreement.

Also on June 17, 2005, the Pahks filed a Motion to Transfer Alleged

Lien to Proceeds and to Authorize Deposit of Funds into Account and Transfer Lien to Account. The motion sought an order transferring the State's lien to a portion of the sale proceeds of the abandoned partnership interest and stock, in an amount equal to the full amount of the State's claim "plus a sufficient cushion."

The State objected to the motion, contending that the bankruptcy court has no jurisdiction over abandoned property and therefore cannot transfer liens from abandoned property to a fund of cash. The State reiterated that it would consent to a sale of the abandoned property if all of the proceeds were escrowed.

After a hearing, the court entered an order granting the motion on July 15, 2005. Consistent with the motion, the order transfers the State's lien from all property of the debtor and the estate to a fund of \$220,000.00. To provide additional protection to the State, the order also states that the escrowed funds can not be disbursed absent unanimous consent or a bankruptcy court order, and if the fund proves insufficient to pay the full allowed amount of the claim, the Pahks will be personally liable for the shortfall.

On July 25, 2005, the State filed a motion for reconsideration, reiterating and expanding upon its jurisdictional argument.<sup>1</sup> Following a hearing,

---

<sup>1</sup>The State also argues that the order grants relief beyond that requested in the motion. The State claims that the motion sought only to remove the State's lien from the abandoned assets, while the order also removes the lien from all property of the estate. This is a misreading of the motion. The motion did not specify from what property the lien would be transferred, and

the court took the matter under advisement. Having carefully reconsidered the State's arguments, I remain convinced that the order is within the bankruptcy court's jurisdiction.

28 U.S.C. § 1334(a) gives the bankruptcy courts<sup>2</sup> "original and exclusive jurisdiction of all cases under title 11." Section 1334(b) gives the bankruptcy courts "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." The bankruptcy court has "related to" jurisdiction over a particular proceeding if:

the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

In re Pegasus Gold Corp., 394 F.3d 1189, 1193 (9<sup>th</sup> Cir. 2005).

---

the Pahks' counsel confirmed at the hearing that the lien would be transferred to the fund from all property of the estate and the debtor.

The State also objects to the language inserted by the court which makes the Pahks personally liable if the fund proves insufficient to pay the State's lawful claim in full. This provision protects the State, and the State's objection to it is incomprehensible.

<sup>2</sup>This is shorthand. Section 1334 and 1367 actually confer jurisdiction on the district courts. 28 U.S.C. § 157 permits each district court to refer all matters within its bankruptcy jurisdiction to the bankruptcy courts. Pursuant to LBR 1072-7, the district court for this district has done so. Rather than repeat this explanation, I will refer to all of the statutes as if they confer jurisdiction directly on the bankruptcy court.

Section 1334(e) gives the bankruptcy courts “exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.”

28 U.S.C. § 1367 expands the other statutory grants of jurisdiction by giving the courts "supplemental jurisdiction over all other claims that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Supplemental or “clean up” jurisdiction applies in bankruptcy cases.

This circuit has applied § 1367 to bankruptcy claims, even when the subject matter jurisdiction is based on ‘related to’ bankruptcy jurisdiction . . . . Here, the remaining claims involve a ‘common nucleus of operative facts’ and would ordinarily be expected to be resolved in one judicial proceeding, and therefore the bankruptcy court has supplemental jurisdiction over the remaining claims.

Pegasus Gold, 394 F.3d at 1195.

There are at least three independently sufficient grounds on which the bankruptcy court has jurisdiction to grant the relief which the Pahks request.

First, the State concedes that the bankruptcy court has jurisdiction of the Fong bankruptcy case by virtue of section 1334(a) and of the Pahks’ objection to the State’s proof of claim by virtue of section 1334(b). Objections to claims against bankruptcy estates are covered by the bankruptcy court’s “arising in”

jurisdiction.<sup>3</sup> 1 Collier on Bankruptcy ¶ 3.01[4][c][iv] (15<sup>th</sup> ed. 2005). Section 1367 gives the court supplemental jurisdiction to grant interim relief in order to permit a disposition of the abandoned assets pending a determination of the Pahks' objection to the State's claim. The determination of the objection to the State's claim, which the State concedes is within the bankruptcy court's jurisdiction, will necessarily determine the amount of the State's lien on the abandoned property and will fix the amount which the State can collect out of that property. The dispute over the amount of the State's claim is part of the same "case or controversy" as the dispute over the disposition of the property which is subject to the State's lien.

Second, "related to" jurisdiction applies. Granting the interim relief which the Pahks request permitted an early payment on account of the Pahks' judgment. This reduced the amount of the Pahks' remaining secured and unsecured claims against the bankruptcy estate, thus affecting the debtor's rights and liabilities and directly affecting the handling and administration of the estate.

The State cites cases holding that "related to" jurisdiction does not extend to abandoned property. This case is different from all of those cases in that there is a lien that encumbers both abandoned property and estate property.

---

<sup>3</sup>An objection founded on bankruptcy law would likely fall within the court's "arising under" jurisdiction. The Pahks' objection is based on non-bankruptcy law. They claim that the tax was overstated and is barred by a statute of limitations. Therefore, the Pahks' objection is covered by "arising in" jurisdiction.

Because the payment of the lien out of the abandoned property will reduce the lien and free up equity in the estate, the treatment of the lien on the abandoned property will affect the administration of the estate.

For example, in In re Israel, 112 B.R. 481 (Bankr. D. Conn. 1990), the trustee filed a report of no distribution and informed the parties that he intended to abandon a parcel of real estate that a tax lien encumbered. The debtor filed an action to avoid the tax lien under 11 U.S.C. § 506(a) and (d). The bankruptcy court held that it lacked jurisdiction because the property had been abandoned and that, even if it had jurisdiction, section 506(d) does not permit the avoidance of liens on abandoned property.

There are at least two important differences between Israel and this case. First, in Israel there was no objection to the underlying tax claim which would create the basis for supplemental jurisdiction. Second, in Israel, the trustee's report of no distribution meant that there were no estate assets to which the tax lien could attach. In this case, the trustee is holding a fund of cash which is presumably subject to the tax lien. Unlike Israel, determination of the tax claim in this case and proper treatment of the tax lien on the abandoned property will have a direct and immediate effect on the estate and the other creditors.

This case involves more than an “internecine conflict” among two

creditors. Matter of Xonics, Inc., 813 F.2d 127, 131 (7th Cir. 1987). Resolution of the tax claim and lien will have important effects on the estate in general.

Third, section 1334(e) gives the bankruptcy court jurisdiction over all property of the debtor as of the petition date and all property of the estate. The abandoned assets were property of the debtor when he filed his bankruptcy case, at which time they became property of the estate. When the trustee abandoned the assets, they left the estate and became property of the debtor once more, but the plain language of section 1334(e) says that they were still subject to the bankruptcy court's jurisdiction.<sup>4</sup>

The State relies on cases which state that “[a]bandonment removes the asset from the jurisdiction of the bankruptcy court.” In re DeVore, 223 B.R. 193, 200 (B.A.P. 9<sup>th</sup> Cir. 1998). This argument exposes a common problem with the English language. The word “jurisdiction,” like every word in the English language, has multiple meanings; the differences among those meanings can be significant; but people (judges included) do not always clearly signify which of the meanings they intend.

---

<sup>4</sup>The jurisdiction under section 1334(e) is “exclusive.” When property is abandoned, the automatic stay terminates as to that property. 11 U.S.C. § 362(c)(1). This frees the parties to take action against the property in non-bankruptcy courts. Taken together, sections 1334(e) and 362(c)(1) mean that, upon abandonment, the bankruptcy court's jurisdiction of the abandoned property is no longer “exclusive.”



“Jurisdiction” has at least three meanings: the power of a tribunal to decide a particular class of controversies; the power of a tribunal to make its decisions binding on a particular person or class of persons; and the power of a tribunal to provide a particular remedy. A careful reading shows that most of the cases cited by the State use the word “jurisdiction” in the third of these senses.

For example, in DeVore, the debtor’s assets included a legal claim against a third party. The trustee hired special counsel to prosecute the action on a contingent fee basis and the trustee recovered a judgment. The trustee decided that collecting the judgment would be uneconomical. Therefore, the trustee filed a report stating that there were no assets from which a distribution could be made to creditors, and the bankruptcy court closed the bankruptcy case. As a result, the judgment was abandoned to the debtor under 11 U.S.C. § 554(c). The debtor initiated collection actions and was able to garner a check payable jointly to her, her attorney, and the trustee. When the debtor sent the check to the trustee for his endorsement, the trustee kept the check and had the bankruptcy case reopened so he could administer the proceeds. His special counsel filed an application for the contingent fee, and the debtor asked the court to require the trustee to release the proceeds to her. The bankruptcy court denied the debtor’s motion and granted special counsel’s fee application.

The bankruptcy appellate panel (“BAP”) held that reopening the bankruptcy case did not reverse the technical abandonment of the judgment, so the proceeds still belonged to the debtor. The BAP also held that the bankruptcy court erred when it compelled payment of administrative expenses out of abandoned property. It explained this result in two different ways. First, it said that “[a]bandonment removes the asset from the jurisdiction of the bankruptcy court.” A few lines later, the court stated that “the court had no jurisdiction to award fees from the litigation proceeds.”

The difference between the two statements is subtle but important. The first statement seems to refer to a limitation on the power of the court over a particular class of disputes. The second statement appears to relate to the power of the court to grant a particular substantive remedy – payment of attorneys’ fees out of non-estate assets. Although the BAP’s brief discussion does not say so, there is no provision of the bankruptcy code that permits the bankruptcy court to require the use of any non-estate assets to pay administrative expenses. Cf. 11 U.S.C. § 726(a) (“property of the estate shall be distributed . . . .”) Thus, it seems more likely than not that the BAP used the term “jurisdiction” in the third sense described above.

Similarly, in In re Bray, 288 B.R. 305 (Bankr. S.D. Ga. 2001), after


the trustee abandoned certain assets to the debtor, a creditor filed an action in bankruptcy court for an order requiring the debtor to turn the assets over to the creditor. The court said that an abandoned “asset is properly removed from the jurisdiction of the bankruptcy court,” id. at 307, but later said that “this Court lacks jurisdiction to entertain a request for turnover of property once the property has been abandoned from the Chapter 7 estate.” Id. at 308. The turnover provision of the Code, section 542, only empowers the bankruptcy court to direct turnover “to the trustee.” Thus, the bankruptcy court lacks power to require turnover to anyone else.

The case cited by the State that is not distinguishable on this basis is In re Green, 241 B.R. 187 (Bankr. N.D. Ill. 1999). It is inconsistent with the plain language of the jurisdictional statutes, and therefore I respectfully decline to follow it.

The State also cites several cases that were decided under the law in effect before the 1978 Code and the 1984 amendments. Brown v. O’Keefe, 300 U.S. 598 (1937); Wallace v. Lawrence Warehouse Co., 338 F.2d 392 (9<sup>th</sup> Cir. 1964); Mason v. Commissioner, 646 F.2d 1309 (9<sup>th</sup> Cir. 1980); In re Tarpley, 4 B.R. 145 (Bankr. M.D. Tenn. 1980). Because the Code and the 1984 amendments completely changed the statutory grant of bankruptcy jurisdiction, cases decided

under prior law are not helpful.

For these reasons, the motion for reconsideration will be denied.



***/s/ Robert J. Faris***  
**United States Bankruptcy Judge**  
Dated: 11/18/2005